

Walker Stainless, Inc. and Sheet Metal Workers International Association, Local #18, AFL-CIO.
Cases 30-CA-14842 and 30-CA-14905

August 21, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS
LIEBMAN
AND TRUESDALE

On January 26, 2001, Administrative Law Judge John H. West issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel and the Charging Party filed answering briefs. The Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions only to the extent consistent with this Decision and Order.

The judge found that the Respondent violated Section 8(a)(3) and (1) of the Act when it discharged employee Dennis Brockman. In exceptions, the Respondent argues that it discharged Brockman for a serious breach of its quality control procedures. For the reasons set forth below, we find merit in the Respondent's exceptions. We shall therefore reverse the judge and dismiss the complaint allegation concerning this discharge.²

The Respondent manufactures, among other things, stainless steel pressure vessels at its New Lisbon, Wisconsin plant. Many of these vessels must contain steel of a high quality, as determined by standards promulgated by the American Society of Mechanical Engineers (ASME). ASME has given the Respondent a certificate of authority to build pressure vessels, which the Respondent stamps to let customers know that an authorized builder has constructed them. To retain its certification, the Respondent must have a third-party inspector on site to review its calculations, drawings, tests, and other pa-

perwork to make sure that it adheres to proper quality control guidelines.

Every 3 years, ASME sends a review board to the Respondent to examine its records, auditing both the Respondent and the third-party inspector.³

Internally, only the Respondent's quality control department determines whether or not a piece of steel meets ASME standards. Once quality control makes its determination, it will record the steel, identified individually by a heat number, in a heat log, with a "Y" or "N" in an "ASME" column. An employee who wishes to use a particular piece of material in an ASME job must consult the heat log. If the heat number is not found in the log,⁴ the employee must call quality control. Quality control will then determine whether or not the material is good for ASME.

The Respondent identifies the quality of material through yellow and red tags. After an employee has ascertained that material meets ASME standards, the employee signs a yellow tag, affixes it to the material, and sends it to the shop floor. The signing of this yellow tag is the last check in the quality control process. The yellow tag signifies to the fabricator of the vessel that someone with quality control authority⁵ has verified that the material meets ASME standards.

If, after checking the log or calling quality control, an employee still cannot determine whether the material is good for ASME, the employee must red-tag it. A red tag denotes that the material is not good for ASME. As the judge found, a red tag may also be used with material that has just been shipped to the plant. In reference to such material, the Respondent's Quality Assurance Manual states that "[m]aterial not in compliance, or with defect or damage, will be rejected and tagged with the 'red' hold tag."

In July 1999,⁶ Dennis Brockman was working as a production material specialist for the Respondent. Part of his job was to dispense steel to fabricators. In that capacity, he was one of the few employees in the Respondent's plant with the authority to sign yellow tags.

The Respondent knew that Brockman had been prominent in the Union's unsuccessful organizing campaign a year earlier. He was involved in an effort to renew that

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

² We adopt the judge's finding that the Respondent violated Sec. 8(a)(3) when it refused to administer a weld test to union organizers Bechard and Blair and refused to consider them for employment on August 19, 1999. We leave to compliance proceedings an evaluation of the remedial consequences of the Respondent's alleged post-violation efforts to contact the organizers, and its subsequent hiring of Bechard.

³ Jobs that require material conforming to ASME standards are called "ASME jobs," and material suitable for use in an ASME job is called "good for ASME," or "code" material.

⁴ This is not uncommon, as there is a backlog between the receipt of new material and the recording of heat numbers in the heat log.

⁵ Only 7 of the Respondent's 400 employees in the New Lisbon facility had authority to sign yellow tags, including 2 employees at issue here: Dennis Brockman and Dennis Roloff. In the case of flat bar, Roloff did not have the authority to sign a yellow tag.

⁶ All dates are in 1999 unless otherwise indicated.

campaign in early July. The record supports the judge's finding that the Respondent was generally aware of the renaissance campaign. It was also aware that Brockman continued to support the Union. Indeed, in late July, Brockman's supervisor Brad Beck jokingly offered to exchange two of the Respondent's antiunion t-shirts for a union shirt that Brockman was wearing.⁷

On July 13, the Respondent was building an 8-foot tall pressure vessel for a company in Brazil. This was an ASME job. Brockman asked the purchasing department to order some more flat bar that the fabricator needed for that vessel. Although, as the judge found, the steel was ordered for a particular job, the purchase order did not contain a specific job number.⁸ The purchase order did require ASME-certified steel.

On July 14, receiving clerk Dennis Roloff examined the material that the supplier had sent. Although the purchase order specified ASME, the delivery receipt did not indicate that the steel was good for ASME. Despite this non-compliance with the purchase order, Roloff did not red-tag the material. Either Roloff or Steve Day, a quality control technician, indicated at some time on a material receiving record, however, that this material was not ASME-certified.

Brockman was waiting for the material and wanted to send it to the shop floor right away. On July 15, he found the flat bar received by Roloff. Brockman saw that the steel had arrived just a day earlier and was exactly the size and quantity that he had ordered. Assuming that this was what he had ordered, and assuming that it was good for ASME, Brockman signed a yellow tag. He did not check the heat log, nor did he call quality control.⁹ If Brockman had done the latter, quality control would not have allowed him to sign a yellow tag for that material.¹⁰ Because Brockman had signed a yellow tag, the material was incorporated into the pressure vessel. The vessel was finished, hydro-tested, and shipped to Brazil.

⁷ Brockman also testified that he saw Beck in an area where Brockman was distributing union cards. Although the judge inferred that Beck must have seen Brockman, we find no need to rely on this incident to establish the Respondent's knowledge of Brockman's continued support for the Union.

⁸ Without a job number, a purchase order does not, on its face, indicate that the material is headed for a particular job, as opposed to inventory.

⁹ The record shows that Brockman has called quality control many times in the past.

¹⁰ This steel's delivery receipt showed it was not ASME-certified. If quality control had acceptable test results for that steel, it could have still certified it if those test results showed that the material complied with ASME standards. This material did not have accompanying test results that would allow quality control to certify it.

On either July 29 or 30, Day was reviewing the paperwork for the material used on the Brazil job. He discovered that the fabricator had used steel which quality control had never certified for ASME. The heat number for that material did not appear in the heat log, and no one from quality control had given approval for its use. Day inquired why the material had been used on the vessel, and discovered that a yellow tag had been filled out by Brockman. Day confronted Brockman, who admitted that he had signed the yellow tag without making the required inquiries in the heat log or with quality control.

Marshall Kuehl, the quality control supervisor, informed Brockman's supervisor Beck that Brockman had signed a yellow tag without checking the heat log or calling quality control. As a result, the Respondent had just shipped a pressure vessel, stamped as ASME-certified, that potentially contained non-ASME material. The Respondent's officials thought that they might either have to ship the vessel back to its plant, or to send a crew to correct the problem. Both corrective alternatives would have entailed significant expense. After tracing the steel back to its manufacturer, however, quality control personnel eventually acquired test results for that material. They determined that the flat bar did, in fact, meet ASME standards. Therefore, no expensive rework was necessary.

On August 4, after conferring with Human Resources Director Kathy Sletten, Beck discharged Brockman. The Respondent's termination notice stated that the reasons for the discharge were Brockman's signing of a yellow tag without any kind of check beforehand, and the Respondent's belief that it would have to spend a great deal of time and money to rework the vessel. Beck admitted at the hearing that by the time he discharged Brockman, he had already learned that no rework would be necessary because the Respondent had located acceptable test results to determine the fitness of the material.

The judge found, for reasons detailed in his decision, that the General Counsel had met the initial *Wright Line*¹¹ burden of proving unlawful motivation for the discharge of Brockman. The judge then found that the Respondent had failed to carry its burden of proving that it would have discharged Brockman even in the absence of his protected union activity. In this regard, the judge emphasized that receiving inspector Roloff did not red-tag the noncompliant shipment of steel, as the company's manual (supported by the credited testimony of Beck) required. Roloff received no discipline. Brockman, how-

¹¹ 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). See also *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996).

ever, was discharged. The judge found that the Respondent's failure to discipline Roloff demonstrated disparate treatment of Brockman, and thus underscored the unlawful motivation for his discharge.

For purposes of our review, we assume, *arguendo*, that the General Counsel did meet the initial *Wright Line* burden with evidence sufficient to warrant the inference of unlawful motivation for Brockman's discharge. In rebuttal, the Respondent has come forward with proof that the alleged discriminatee engaged in misconduct warranting discharge, and that it relied on this misconduct. But the General Counsel has also presented evidence of disparate treatment. In such a case, an employer may still meet its *Wright Line* burden by showing that "the disparity in discipline between alleged discriminatees and the General Counsel's comparators is attributable to differences in work history, to the severity of misconduct, or to some other factor unrelated to union activity." *Avondale Industries*, 329 NLRB 1064 (1999) (emphasis added). Contrary to the judge, we find that significant substantive differences between Roloff's and Brockman's respective errors preclude a finding that Brockman was the subject of disparate treatment.

We begin with the extreme seriousness of Brockman's misconduct. He was the last person in the Respondent's quality control chain who could prevent the use of unacceptable steel in an ASME job. Brockman admitted that he had a duty to first check the heat log to see if the steel he wanted to use was listed there, but he did not. He also admitted that, if he could not find the material listed in the heat log, he had a duty to call quality control, but he did not. He further testified that only quality control, not he, was competent to determine a piece of material's suitability for ASME use; yet he simply assumed the flat bar he found on July 15 was good for an ASME fabrication. It is also uncontroverted that after Brockman signs a yellow tag, the fabricator does not check to see if that material really does comply with ASME, but only looks to see that the yellow tag has been filled out correctly.

After Brockman knowingly signed the yellow card without taking the necessary steps to assure that the steel was ASME certified, there was no turning back. The pressure vessel would now contain material that could be non-code, which Brockman admitted would be unsafe.¹² Although the Respondent was able, after the fact, to determine that the material did meet ASME standards, this in no way minimizes the potential danger and liability that Brockman created. Furthermore, ASME requires the Respondent to use ASME-certified steel for certain jobs,

and monitors the Respondent's compliance in this regard. Brockman's conduct directly circumvented the Respondent's efforts to follow ASME guidelines.

Roloff's error of omission was far less serious than Brockman's error of commission. Roloff's error came at the beginning of the process, and he did not have the same responsibilities that Brockman had. Roloff had no obligation to check the heat log or to call quality control. Roloff was receiving material into the plant, not releasing material for fabrication in a specific job. Certainly, his failure to red tag the flat bar permitted Brockman to make his mistake, but Roloff's oversight in no way signified that the material in question was ASME certified. Furthermore, it was not uncommon for Roloff to receive and process steel that could be used in non-ASME jobs. Beck, whose testimony the judge credited, stated that if Roloff "just passed on" steel that was not ASME certified, but was supposed to be ASME certified, he *could* be subject to discipline, but neither Beck's testimony nor any other evidence in the record suggests that any discipline was mandatory in these circumstances.

Based on the foregoing, we find that the failure to discharge any employee other than Brockman for conduct resulting in the potential inclusion of noncertified metal in an ASME fabrication does not show disparate treatment.¹³ We therefore find that the Respondent would have discharged Brockman even in the absence of his protected union activity because he yellow-tagged and sent the steel to fabrication without following the critical quality control assurance procedures for ASME jobs. We conclude that the Respondent lawfully discharged Brockman for this unprecedented offense.

ORDER

The National Labor Relations Board orders that the Respondent, Walker Stainless, Inc., New Lisbon, Wisconsin, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Telling job applicants that they cannot take a weld test because they are from the Union and not bona fide applicants.

(b) Refusing to consider job applicants because they are union organizers.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

¹² According to Day, an employee of 32 years, no one ever before signed a yellow tag without the necessary quality control check.

¹³ We reject as unfounded speculation the judge's suggestion that Day and purchasing department personnel were also at fault and should have been subject to discipline.

(a) Place Jeff Bechard and Todd Blair in the positions they would have been in absent discrimination, for consideration for future openings, consider them for the openings in accord with nondiscriminatory criteria, and notify Jeff Bechard, Todd Blair, Sheet Metal Workers International Association Local #18, AFL-CIO, and the Regional Director for Region 30 of the Board of future openings in positions for which Bechard and Blair applied or substantially equivalent positions.

(b) Within 14 days after service by the Region, post at its facility in New Lisbon, Wisconsin, copies of the attached notice marked "Appendix."¹⁴ Copies of the notice, on forms provided by the Regional Director for Region 30, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 19, 1999.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives
of their own choice

¹⁴ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

To act together for other mutual aid or protection
To choose not to engage in any of these protected
concerted activities.

WE WILL NOT tell job applicants that they cannot take a weld test because they are from the Union and not bona fide applicants.

WE WILL NOT refuse to consider job applicants because they are union organizers.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of rights guaranteed you by Section 7 of the Act.

WE WILL place Jeff Bechard and Todd Blair in the positions they would have been in absent discrimination, for consideration for future openings, consider them for the openings in accord with nondiscriminatory criteria, and notify Jeff Bechard, Todd Blair, Sheet Metal Workers International Association Local #18, AFL-CIO, and the Regional Director for Region 30 of the Board of future openings in positions for which Bechard and Blair applied or substantially equivalent positions.

WALKER STAINLESS, INC.

Paul Bosanac, Esq. and Angela B. Jaenke, Esq. for the General Counsel.

Michael H. Auen, Esq. (Foley & Lardner), of Madison, Wisconsin, for the Respondent.

William H. Ramsey, Esq. (Previant, Goldberg, Uelmen, Gratz, Miller, & Brueggman), of Milwaukee, Wisconsin, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JOHN H. WEST, Administrative Law Judge. A charge was filed on August 6, 1999,¹ in Case 30-CA-14842 by Sheet Metal Workers International Association Local #18, AFL-CIO (Charging Party or Union) and it was amended on October 28. A charge was filed on September 29 in Case 30-CA-14905 by the Union. On December 20 an Order consolidating these cases and a complaint was issued. The consolidated complaint alleges that Walker Stainless (Respondent or Walker) violated (a) Section 8(a)(1) of the National Labor Relations Act (Act), by Kathy Sletten telling applicants Jeff Bechard and Todd Blair that they could not take weld tests because they were from the Union and not bona fide applicants, and (b) Section 8(a)(1) and (3) of the Act by discharging its employee Bennis Brockman on August 4, and by failing to consider Bechard and Blair for hire on August 19. The Respondent admits that Bechard and Blair on August 19 (1) were not allowed to take a welding test and Sletten questioned whether they were bona fide job applicants, and (2) Sletten did not consider them to be serious applicants only on that day. Otherwise the Respondent denies violating the Act as alleged.

¹ Unless indicated otherwise, all dates are in 1999.

A hearing was held on February 28 and 29, 2000, in Mauston, Wisconsin. On the record, including the demeanor of the witnesses, and after due consideration of the briefs filed by counsel for the General Counsel and the Respondent in April 2000, I make the following

FINDINGS OF FACT

Jurisdiction

The Respondent, a Delaware corporation, with offices and places of business in New Lisbon and Elroy, Wisconsin, is engaged in the manufacturing of various stainless steel products. The complaint alleges, the Respondent admits, and I find that at all times material, the Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and the Union has been a labor organization within the meaning of Section 2(5) of the Act.

Facts

The Respondent has about 400 employees at New Lisbon and about 120 employees at its Elroy facility.

Brockman, who became a full-time employee of the Respondent in 1987, contacted the Union in October 1997, and union meetings were held beginning in early 1998. Brockman solicited signatures on union authorization cards at the New Lisbon facility and he distributed union handbills. In 1998, there were postings that identified Brockman and others as union supporters.² Brockman told Supervisors Ron Larson and Sletten, who is the Respondent's director of human resources, about the postings, which he turned over to them. Sletten asked supervisors and lead men about the three pages. During 1998, Brockman and about 19 other employees at New Lisbon wore union T-shirts.³

² GC Exh. 4. The first and second pages of the exhibit read as follows:

Dennis you should
Not even have a job
Here.

Union is insurance for the lazy to keep their jobs
Stop take a look at the people who want the union. They are all fat,
lazy or stupid

Dennis B. = fat, lazy [sic]
Vern = fat, lazy [sic]
Marty = fat, lazy [sic]
Tod S. = fat
Mark = Stupid, lazy [sic]
Dave P. = Stupid, lazy [The word 'stupid' was circled.]
Randy W. = fat, lazy [sic]
the list goes on and on
if you don't like your job quit!
Union cry babys [sic]
I hear you don't like it when I called some of you fat, lazy
[sic] and stupid. You know what they say. "Only the true herts"
[sic]

Fat, lazy [sic], stupid union lovers

The third page of the posting reads as follows:

VOTE UNION AND WATCH THE FAT, LAZY
COCKSUCKERS STAND AROUND ALL DAY WATCHING
YOU WORK AND *NOTHING* HAPPENS TO THEM! [Emphasis in original.]

³ Sletten testified that Brockman also wore a union T-shirt in 1999.

Brockman testified that he distributed union T-shirts during lunch and coffeekbreaks and after work and some employees picked the T-shirts up at his house; that the first page of the above-described postings was posted all over the bathroom stalls in the special area, the second page was on his desk, and the third page was attached to his computer; and that he told Larson and Sletten about the postings but he did not hear back from either one of these individuals.

Jeff Bechard, who is an organizer for the Union, testified that Brockman contacted him about organizing the Respondent's employees; and that Brockman was the key person when the Union needed to pass out information to the Respondent's employees.

The Union lost the Board election, which was held at the Respondent's two facilities on October 15, 1998, General Counsel's Exhibits 2 and 3. Its objections were overruled. Brockman was the union observer in New Lisbon.

Portions of the Respondent's employee handbook dated May 1999, General Counsel's Exhibit 5, read as follows:

A Word About Unions

... We strongly believe that a union will not contribute anything good or positive to our relationship. We also know that the best way to continue our mutual success is to do it 'on our own' without interference from a union. [p. 4.]

The performance evaluation is part of the merit pay system. Pay increases are based, in large part, on the performance of the employee. The written performance evaluation document becomes part of your personnel file in the company, and may be used to make decisions regarding promotion, retention or other employment decisions.

On May 7, Bechard mailed a notice to the Respondent's employees, General Counsel's Exhibit 24, indicating that there would be employee meetings again, and asking for employee input regarding the location of the meetings.

On July 14, Bechard mailed a notice to the Respondent's employees indicating that there would be a union meeting on July 21, General Counsel's Exhibit 22.

Company T-shirts were passed out with the words "On our own in July 1999. Sletten testified that the Company held meetings on July 14 and 15, and company T-shirts with "On our own" on them were handed out to employees; and that was the first time since the election that this kind of T-shirt was handed out. Sletten testified that the T-shirts were handed out at an appreciation lunch because Walker was finishing up the first implementation phase of a "lean" manufacturing process; that the lunch was planned in April 1999; that since July 1999, Walker has been giving out "On our own" T-shirts to new employees when they start; and that the "On our own" T-shirts were distributed in the spring of 1999 in conjunction with events involving the implementation of the "CDS lean manufacturing process." On cross-examination Sletten testified that "On our own" means "we can do things on our own, we do not need a union here; and that these T-shirts are routinely handed out to new employees."

On July 15, a shipment of two 1-by-5-inch flat bars was received at the Respondent's New Lisbon facility. Dennis Roloff, who was the receiving clerk under quality control, was

the individual who was responsible for receiving shipments which came into the New Lisbon facility. Brockman testified that he had performed (for almost a year) the job that Roloff was performing on July 15; that the purchase order comes with the material in a sealed envelope when the material is shipped; that the purchase order for the involved material was something that the receiving clerk, Roloff, would have seen; that the involved purchase order number is SP15032⁴; that the supplier's delivery receipt, General Counsel's Exhibit 14, which comes with the shipment, does not indicate that the material is SA36 and, therefore, you could not tell if the material was ASME certified; that when he worked the receiving job, if the delivery receipt did not come in the same time as the purchase order, he would call the purchasing agent and the supplier could fax a copy of the test report in about 30 minutes; that when he worked as receiver if the delivery receipt did not match the purchaser order, the first thing he would do would be to put the material off to the side so nobody could get their hands on it; that General Counsel's Exhibit 15, which is dated July 13, 1999, is a material certification from the supplier which Roloff would have seen; that General Counsel's Exhibit 16 is a certification dated "6/11/99" from Niagara Lasalle Corp. and the supplier, J.T. Ryerson and Son; that the certification goes to the receiver; that as of July 15, he did not see this paperwork; that General Counsel's Exhibit 17 is a material receiving record, dated July 15, which was filled out by the receiver, Roloff; that all of this paperwork, General Counsel's Exhibits 13, 14, 15, and 16, goes to quality control; that on the material receiving record "NO" is circled on the line for "MATERIAL OK PER SECTION II" which means that the material was not shown to be ASME certified; that on July 15, he certified that the material which he gave to the fabricator was ASME certified⁵; that on July 15, Roloff brought the material down to him; that he knew that the fabricator needed the material right away and the material would not be in the heat log, General Counsel's Exhibit 18, right away; that the purpose of the heat log is to indi-

⁴ It has a P.O. order date of "7/13/99," and it describes the item as "CS FLAT BAR 1 by 5 inches SA 36, Vendor Part #FBRCS10000500." This copy of the original purchase order is attached to the GC's Exh. 27. The quantity listed is 24 feet @ \$6.15 for a total price of \$147.60. Sometime after the material was received "TYPE: CD 1018, HT#H7387" was added to the purchase order. A copy of the revised purchase order was received as GC's Exh 13.

⁵ The Respondent's position statement, dated November 9, was received as GC Exh. 26. As here pertinent, a portion of the position statement reads as follows:

Dennis Roloff took the information from there three sheets, plus Purchase Order 15032, and completed the "Material Receiving Record" (W006). He recorded: the "Type: CD 1018;" The "Heat# 7387;" the manufacturer, "Niagara LaSalle;" the Purchase Order Number; that "SA36" material was requested; and the marking painted on the steel; "561439011." *Most important*, he circled "NO" as to "material OK per Section II." The "no" marking means it is not ASME material, and it does not meet Section II standards. [Emphasis added and footnote omitted.]

As noted below, Roloff testified that he did not speak to the attorney who signed this position statement until January 17, 2000, he did not circle the "NO" on the involved material receiving record, and he did not write on the material receiving record that SA36 material was requested.

cate whether the steel is good for ASME use; that part of his duties on July 15, was to check the heat log to see if the material was ASME certified; that he did not check the heat log on July 15, to see if the involved material was ASME certified because he knew that it would not be there and that it takes 5 to 7 days to update the heat log; that Steve Day in quality control prepares the heat log; that when he received the involved material on July 15, it was not red tagged and it was not indicated to him in any way that it was not ASME certified; that when he worked as the receiver he put red tags on material and put it off to the side if there was a question as to what the material was; and that the Respondent did not have any of the required – by-5 inch flat bar in stock and they were waiting for this material.

On July 21, there was a union meeting at the American Legion Club in New Lisbon.

Brockman testified that after the July 21 union meeting, he handed out union authorization cards during lunch and coffee-breaks and after work; and that he saw Supervisor Brad Beck and leadman Todd Bunker in the area when he was handing out union authorization cards.

Sletten testified that the Respondent has a policy of progressive discipline in some cases depending on the severity of the incident; that progressive discipline includes oral warnings, written warnings, suspensions, and discharge; and that Brockman had been suspended for performance but she could not recall the date or what the performance issue was.

According to the testimony of Brockman, about 1 week before his discharge he had a conversation with Beck. Brockman testified that he was wearing a union T-shirt with a rip and Beck, in kind of a joking manner, asked him if he wanted to trade the union T-shirt in for two of the Company's "On our own" T-shirts; and that he declined Beck's offer jokingly stating, "[Y]ou are telling me that the union shirt is worth more than two of the 'On our own' shirts."

Brockman, who according to Sletten's testimony was a production material specialist, was discharged on August 4. The position is not part of the quality control department but it is an extension of the quality control function. Part of Brockman's job was to dispense steel to fabricators.⁶ Sletten testified that Production Supervisor Beck told her that Brockman was terminated "[f]or failure to make the necessary checks to determine that what he was issuing to the floor was, in fact, ASME certified and for certifying it as such"⁷ (Tr. p. 47); and that Beck explained to her that the tag for the material "had been properly filled out and then the steel which was improper, which was not certified, which had been sent to the production floor and incorporated into a pressure vessel [tank]."

Brockman's termination form, General Counsel's Exhibit 7 (which is also an attachment to the Respondent's position statement, GC Exh. 25), which is dated "8/4/99," indicates, as here pertinent, as follows:

⁶ A position description, which was represented by the Respondent to be that of Brockman when he was discharged, was received as GC Exh. 6. The description was enclosed with the Respondent's position statement dated September 22, GC Exh. 25.

⁷ ASME is an acronym for the American Society of Mechanical Engineers which sets standards for steel used in pressure vessels or tanks.

on work order # 14696, failed to check that the material for the job was ASME code material. The job was manufactured *without ASME material, costing a lot of time & money to re-work*. Dennis knows this is a very important step in insuring that our products meet legal requirements and customer needs.

Based on discussion with Brad Beck, termination is recommended.

This document was not given to Dennis. Terminated by Brad. [Emphasis added.]

Bradley Beck signed the form and next to his signature "8-10-99" appears. Two other signatures on the form (one for witness and Sletten for human resources) are dated August 4. Sletten testified that she wrote "The job was manufactured *without ASME material, costing a lot of time & money to re-work*." (Emphasis added.); that the job did not have to be reworked; that there was no money involved in rebuilding the unit; that it was her understanding at the time that it cost a lot of time and money to rework; that when she subsequently learned that it did not cost a lot of time and money to rework, she did not add this to the termination form or write this down on any other document; that she was involved in the decision to discharge Brockman and she acted in conjunction with Beck; that her decision was based on the error, the seriousness of the error that was made, and the fact that Brockman issued material without checking and the material was not certified; that Brockman should have checked the "heat treat log"; that if Brockman had looked at the log he would have seen that the material was not listed and was not ASME certified; and that she was aware that when employee Vern Whipple dropped a tank while driving a fork lift, it was determined that he was not at fault and he was not discharged.

Beck, when called by the General Counsel, testified that he made the decision to discharge Brockman; that he told Brockman on August 5, that he was discharged; that Brockman was discharged because he sent material to the fabricator that was not ASME checked; that Brockman was supposed to insure that the involved material was ASME certified by filling out the yellow tags that traveled with the ASME material; that the yellow tags are not included with the documentation that comes from the foundry into the Respondent's facility; that Brockman was supposed to check the "heat log" to determine if the material was ASME certified; that the person who cuts the material after checking to make sure he has the right material, fills in the "heat log"; that quality control prepares the "heat log"; that quality assurance is responsible for printing out the "heat log"; that after Brockman passed the involved material on to the fabricator, no one checked to see if it was ASME certified because Brockman is the final check; that after the storage tank on which the involved material was used was shipped, someone checked to determine if ASME certified material was utilized; that at the time of Brockman's discharge, the involved tank had been shipped; that the tank had an overseas destination but he did not know where the tank was at the time it was determined that there was an error; that he did not know when the involved material came into the Respondent's facility; that he signed General Counsel's Exhibit 7, Brockman's termination form, on

August 10, and at the time he believed that it was accurate; that although the form indicates "costing a lot of time & money to rework," there was no reworking on the job; that man hours were spent tracking down the material back to the foundry but he did not have the exact man hours; that by August 10, he knew that the material was actually ASME certified; that General Counsel's Exhibit 12 is the yellow tag which Brockman billed out on July 15;⁸ that the "SA36" is the designation for ASME certified; that the only papers he reviewed in connection with Brockman's discharge were the "yellow tag" and General Counsel's Exhibit 19, which is a certification "THAT THE STEELS HAVE BEEN TESTED IN ACCORDANCE WITH SPECIFICATIONS";⁹ that the Respondent has someone who accepts the material shipped to its New Lisbon facility and that individual has the responsibility to accept or reject materials which are not in conformance with the purchase order, placing a red tag on material that is not ASME certified; that ASME certified material had been requested for the involved job and if the material coming in was not ASME certified, the individual who received that material should have placed a red tag notice on the material; that this should have been done before the material went to Brockman; that he did not check and he did not know whether the individual who received the steel and passed it on to Brockman put a red tag on it before passing it on to Brockman; that the individual who received the steel which was supposed to be ASME certified but was not, and just passed it on was not doing his job and could have been subject to discipline; that when he discharged Brockman he told him that "[i]t took four employees three days of research to get the material ASME certified" (Tr. p. 92); that Brockman then asked him if it had anything to do with his being a union supporter and he told Brockman "[a]bsolutely not"; that he did not know as of the date that Brockman was discharged that the material was ASME certified; that in view of the fact that he told Brockman when he discharged him that it took four employees 3 days of research to get the material certified, he knew when he discharged Brockman that the material was ASME certified; and that when Brockman was discharged he, Beck, knew that there was no rework to be performed and that there was not time and money spent reworking.

In response to questions of the Respondent's counsel, Beck, testified that he did not set up the quality assurance or quality control system at Walker and he was not trained in how the

⁸ The printed portion of the tag reads as follows:

ASME MATERIAL
P.O. NO.: _____ JOB NO.: _____
HEAT NO.: _____
[] ACCEPTANCE BY: _____ DATE: _____

above "ASME MATERIAL" the following is handwritten: "Atten. Mike R." In the space below "ASME MATERIAL" the following is handwritten: "2 pcs. 75" Lg. [long] of 1"x5" C.S. [carbon steel] Flat Bar SA36." The following purchase order, job and heat numbers are written, respectively, on the form: "Sp15032," "14696," and "H7387." There is a check in the box on the last line of the form, "D. Brockman" appears on the "ACCEPTANCE BY:" line, and "7/15/99" is written on the "DATE:" line.

⁹ In a block stamped on the form the date of "JUL 08 1996" appears. In the "REMARKS" section of the form the following is written: "Meets specs for SA 36-A98 MMK 8/6/99."

system operates; that the problem with the ASME material released by Brockman on job number 14096 was brought to his attention by quality assurance manager Marshall Kuehl; that Kuehl told him that he did not have the information showing whether the material that was delivered to the fabricator was ASME; that Kuehl told him that Brockman failed to check that the material delivered to the fabricator was ASME material; that he believed that the tank involved was headed for Brazil; that the tank had been shipped by the time Brockman was terminated; that the involved material should have been ordered for specific job and not for stock; that he wrote Respondent's Exhibit 1 which is an e-mail he sent to Sletten on August 10, regarding the reason for Brockman's discharge;¹⁰ and that Brockman could not rely on the absence of red tag to assume that it was ASME material but rather he had to check the heat log and if it is not in the heat log he was supposed to check further.

Subsequently Beck testified that he had no personal knowledge regarding how many people were involved in determining that the material was ASME certified and he did not know how long it took them to reach this determination; and that this was information he was given by Kuehl.

The following appears in Respondent's Exhibit 4,

Walker's Quality Assurance Manual:

4.13 Materials purchased to ASME specifications for jobs will be checked by the Receiving Inspector, verified with the purchase order and recorded in the Receiving Log The Receiving Inspector will record P.O. number on M.T.R. and C. of C. and tag base material and package with the ASME Identification Tag (Exhibit [the yellow tag]) and enter required information such as date received, purchase order number, vendor, location number, test/heat number and job number. Material will be stored in the designated warehouse 'hold' area.

4.14 Materials purchased to ASME specifications for stock will be checked by the Receiving Inspector, verified with the Purchase Order and recorded using Material Receiving Record (M.M.R.) [sic] form The Receiving Inspector will record Purchase Order Information on M.R.R. form and actual material markings and thickness of sheets and plates. He will then mark M.R.R. form for acceptance or rejection of material and sign form. After inspection of material the [R]eceiving Inspector will add Walker['s] purchase order number to the material. Material will then be put into stock.

¹⁰ The memorandum reads as follows:

We have A.S.M.E. material sheets we have to check our material against so we are ensured that the right material is used for A.S.M.E. jobs that required this material. We had a job [#14696] that the material was not checked the wrong material was used. Mr. Brockman has been doing this job long enough to know that this is a very important step in our process. This was a huge mistake that took a lot of time to sort out and make right. From past records there has been performance issues with Dennis Brockman this was the one of many that broke the camels [sic] back.

On redirect by counsel for the General Counsel Beck testified that he did not know for a fact whether the material was checked by Brockman.

The M.R.R. form is given to Q.C.L.T. for attachment to the mill test report.

To use stock material for a job the heat number & P.O. number will be verified and recorded in the Receiving Log with all necessary information and a ID identification tag [the yellow tag] will be made out and attached to material. The Receiving Log & ID tag will not be signed without confirmation from the Q.C.L.T. that the required M.T.R. is acceptable. Signing of Receiving Log & ID tag will release material for job.

4.15 Material not in compliance, or with defect or damage, will be rejected and tagged with the 'red' hold tag Non-acceptable material will not be used for ASME code vessels unless corrected and accepted by the Q.C.L.T. Any welded repairs will be performed with the prior concurrence of the A.I. Non-conformities noted during receiving or fabrication shall be documented on the Non-Conformity Report or Material Receiving Record Form The A.I. will be notified of proposed disposition.

Marshall Kuehl, who is the quality control lead technician and who is in charge of quality control, testified that in July and August 1999, Steve Day and Tim Meyer worked for him; that Day basically had the same job as he does and Meyer is the shop inspector; that the involved tank was a pressure vessel, 72 inches in diameter and about 8-feet tall; that the tank was to be delivered by sea over Milwaukee, Wisconsin, to Brazil; that Walker was required to go through third-party inspection by Hartford Insurance on the tank; that Walker has a certificate of authority from ASME to build tanks where over 15 pounds of pressure and vacuum are involved; that every 3 years a review board from ASME comes to Walker and reviews its quality control system, including its past records, to make sure that everything was done correctly by Walker and the third-party inspection; that the involved tank was not at the facility when he got involved; that "SA36" is an ASME specification; that the involved flat bar was required to be ASME material because it was used for reinforcing; that the person who releases the material "from stock" (Tr. p. 205) is supposed to check the heat number, the PO, the heat log or call the quality control department and verify that the quality control department has acceptable test reports for the material; that the heat log will indicate whether the material is ASME certified; that approximately 50 percent of Walker's production involves non-ASME jobs; that Walker's Quality Assurance Manual, Respondent's Exhibit 4, covers the procedure for releasing stock material to the floor; that once a material is released to the floor, Meyer only verifies that the markings on the material (the heat and PO numbers) match the markings on the yellow card and that the yellow card is signed; that Meyer signed the inspection sheet (also referred to as the ASME traveler) for the involved material, Respondent's Exhibit 2, on July 16; that "after" (Tr. p. 212) the job is finished, his office verifies, by pulling the "MTRs" (metallurgical test reports),¹¹ Respondent's Exhibit 3,

¹¹ As noted below, quality control technician Day testified that "MTR" is the acronym for material test report. And par. 4.14 of R. Exh. 4 refers to a "mill test report."

that the material used was what was called for on the drawing; that Respondent's Exhibit 5 is the specification requirements for SA-36; that when Day "was reviewing the MTRs he came across the ones for the support bars that we did not have an MTR for" (Tr. p. 215), namely heat number H7387; that Day told him that he did not have an MTR for the involved material and he was going to go through purchasing to get it; that purchasing had to go back to the Mill to see if they could get an acceptable MTR; that if the bar stock did not meet ASME requirements, the support bars would have to be replaced; that when Day told him that they were missing a material test report for H7387 he told Beck that they had a tank that was probably going to have to be brought back or they would have to send a crew out to fix the problem if they could not get the test reports; that the test report would be an acceptable MTR with the SA-36 specifications showing all the testing that had been done on the material at the mill; that his department investigated, retrieved the yellow card, determined that the materials were released, and Meyer followed the procedures as far as verifying that the items were marked correctly; that it was determined that the mistake was made by Brockman; that this kind of mistake is important because Walker has procedures that are written and the ASME and National Board expect Walker to follow them strictly in order to maintain its certificate of authorization; that this mistake has never happened before; that Walker received an acceptable test report about a week or a week and a half after the problem was found (see the last page of R. Exh. 3.); that he initialed the test report and dated his initials "8/6/99"; that he told Beck that they would not have to bring the tank back or go and repair it; that he believed that he told Beck that Brockman was the one who released the material; that under the quality control procedures if somebody wants to release code material to the floor and they cannot find the heat number or purchase order on the log, they are supposed to call him or Day and they would determine if they had an acceptable mill test report; that a red tag is used if material comes in specifically for a job it would be red flagged while they were waiting for a test report; and that if the material is ordered with an SA-36 but it does not come in with an indication that it is SA-36, the receiver is not supposed to do anything with a red tag

because over half of our vessels (tanks) are non-code. Most of our material is ordered off from a part number, including this one. And when that part number is broken down as far as sending out a purchase order it gives out the specifications and it automatically includes an ASME spec because we try to maintain material on hand that can be used for ASME, but we know—and we do have a lot of inventory that cannot be used. [Tr. 222–223.]

It is noted that Walker's involved original purchase order describes the material as Walker part number FBRCS10000500 and as CS FLAT BAR 1-by-5 inch SA36, Vendor Part #FBRCS10000500. It is also noted that the involved delivery receipt, General Counsel's Exhibit 14, specifies, as here pertinent, reads as follows:

CUST ORDER	REFERENCE	DESCRIPTION
SP15032	561439 01 01 001	CD 1018
	PR	1xFLTx10FT8/12FT

DATE 07/13/99

T/R WITH SHIPMENT

SALESREP # 522 EXT. 0239

Green

PART#FBRCS10000500

HEAT# H7387

Kuehl further testified that he wrote the following on the delivery receipt, General Counsel's Exhibit 14: "Dennis Roloff, delivery receipt of the 1 by 5 inches bar. CD 1018 is referenced. Material was accepted because it was ordered for non-ASME use." As noted above, Walker's involved purchase order specified, as here pertinent, "SA-36" which indicates that it is ASME material. Kuehl testified that he made this note in connection with his investigation of the problem; that only seven people in the plant have the authority to sign yellow tags because Walker wants to maintain a strict line to make sure that only acceptable ASME materials are used;¹² that on the involved material receiving record, General Counsel's Exhibit 17, Roloff would not have circled "NO" on the "MATERIAL OK PER SECTION II" line since quality control fills out that particular line; that Roloff is not expected to fill out that particular line because the receiver is not expected to be familiar with all of the required markings for ASME and quality control verifies that the actual markings do meet the ASME requirements;¹³ and that this particular line does not involve the review of the material test report.

On cross-examination Kuehl testified that he did not see whether Roloff circled the "No" on the involved material receiving record and he does not know; that he or Day usually circles the "No" or "Yes" but he did not have specific recall of doing it himself or seeing Day do it on the involved form; that in the Respondent's attorney's November 22 letter to the Board, General Counsel's Exhibit 27, it is correctly indicated that everything below this line of this form is filled out by the quality control department; that form "WOO01A" attached to the aforementioned November 22 letter is the original purchase order for the involved material;¹⁴ that since there were two different heat numbers for the involved item on the inspection sheet that would suggest that there was not enough material on hand and as a consequence more material had to be ordered for that particular job to be completed; that one of the two pieces on the involved yellow tag was taken out of inventory and did meet ASME standards; that Roloff, as receiving inspector, should have known if the material that comes in is in conformance with the purchase order; that the purchase order indicates that "SA-36" material was ordered; that "SA-36" on the involved purchase order indicates that the material should have been ASME certified; that Roloff should have known that certifications were required on the involved material if it came in as "SA-36"; that Roloff, as receiving inspector, is in a position to know if the material that comes in is in conformance with the purchase order; that if the material is strictly going to be used for ASME "it has to have the test report markings, all have to be correct. But if its going to be for inventory, our

¹² One of the seven is Roloff.

¹³ According to the testimony of Kuehl, the following should be on the material or on a tag attached to the material: the heat number, the type, purchase order, and the manufacturer.

¹⁴ It contains the same information as GC Exh. 13, except it does not contain "TYPE: CD 1018, HT#H7387" under the description of the item.

be correct. But if its going to be for inventory, our policy a lot of times . . . [is] to accept it and put it in the stock. Even if it doesn't" (Tr. 233); that Roloff still has to put the heat number and any other markings on there have to remain on it; that Roloff has the purchase order when the shipment comes in; that Roloff would have looked at the involved purchase order which indicates "SA-36" when the involved shipment was received; that when Roloff saw that the shipment did not indicate "SA-36" he would go back to purchasing and purchasing would come to him if purchasing decided to keep the material and if they knew that it definitely used for ASME but if its for inventory, a lot of times they do not; that "[a] lot of times when they [the Purchasing Department] get that steel it's because it's to be used for a specific job" (Tr. 236); that Walker also has blanket steel that's for just inventory; that the involved purchase order was not for a specific job; that he was not 100 percent sure that Walker purchases all of its 1-by-5 inch flat bar to meet SA-36 specifications but they try to order almost all of their steel to ASME specifications; that he is not aware of Walker ordering non-SA-36 1-by-5 inch bar;¹⁵ that he thought that Roloff would have received General Counsel's Exhibits 14 (the delivery receipt), 15 (the material certification), and 16 (the certification) with the involved shipment; that General Counsel's Exhibits 14, 15, and 16 would not indicate whether the material is ASME certified because the quality control department does not have initials on it anywhere at that point; that when the involved shipment came in, Roloff would have known that it was not SA-36; that he did not believe that the material Brockman released had a red tag on it before he got it; that the Receiving Inspector is the one who puts a red tag on the material if one is required; that at some point (described by the witness as "later") he asked Roloff to retrieve the delivery receipt; that he wrote on the delivery receipt, General Counsel's Exhibit 14, "Dennis Roloff, delivery receipt of the 1-by-5 inch bar. CD1018 is referenced. Material was accepted because it was ordered for non-ASME use"; that it is not entirely correct that the purchase order for this particular shipment indicates that it was for ASME use because while it was ordered to SA-36 specification, that does not tell what it is going to be used on; that SA-36 means that it is ASME certified; that the purchase order, therefore, specifies that the Company was ordering

¹⁵ GC Exh. 28 is a "MATERIAL REQUEST SHEET" which reads, as here pertinent, as follows:

Name: M. Rusch
 Items requested: 1X5x75-2pcs . . .
 Date: 7/9/99
 Deadline time: 7/12/99 A.M.
 Location/Deliver to: Sand Blast then Door #2
 Quantity: As listed
 Time that the form is filled out: 300 PM
 ASME. Y N [the "Y" was circled]

The material will still have to be bought to the . . . toolroom to be written up and signed off. This question is asked only to provide information as to whether or not the material is ASME qualified.

Work Order No. #: 14696

Notes: Material for supports on . . . and Bottom head.

At the top of the involved yellow tag the following appears:

"ATTEN. MIKE R."

ASME certified; that nonetheless he wrote on the delivery receipt that it was ordered for "non-ASME use [b]ecause *I had been told that this had been brought in for maintenance to use. The material was not for use in the shop. That's why I wrote that*" (emphasis added); that he was not sure when he wrote this note on the delivery receipt but it was after the material was used on the tank; and that the mill test on the involved material, Respondent's Exhibit 3 (GC Exh. 19 is a copy of the same document.), was presented to him by Day and he did not know whether the document was faxed or mailed to Walker.

On redirect, Kuehl testified that in 1999 if material came in for stock it is signed off, with a yellow tag, when the material is requisitioned from the shop and not when its received; that no one can fill out a yellow tag and certify that the material is ASME material without finding the heat log index or contacting quality control; that the receiving inspector is not in a position to determine whether a particular piece of steel, in fact, meets ASME certification requirements without checking the heat log or calling quality control; that quality control makes the entries in the heat log; that the Receiving Inspector has to compare the material ordered to the material received; that the line on the material receiving record which specifies "MATERIAL OK PER SECTION II: YES NO" signifies that quality control has accepted the actual markings that they've documented as meeting the requirements for that specification; that this line on the material receiving record speaks to a requirement that the ASME material be marked a certain way in accord with Section II; that the Quality Assurance Manual, Respondent's Exhibit 4, has no application to material that is not ASME code material; that CD1018 is not an ASME code material; that usually SA-36 is marked on the material by means of a tag or it is painted on; that if the receiving inspector looked at the material and there was no SA-36 marked on it, the person would conclude that the material "probably [is] no good for ASME" (Tr. 259); and that even with the designation of SA-36 on the material, quality control has to review MTRs after the material markings have been verified and checked out before it can be used for ASME.

On recross, Kuehl testified that no one at Walker could just look at a piece of steel and determine that it is ASME certified; that in order for anyone at Walker to determine if the material is ASME certified, they would have to look at paperwork; that Walker does not do its own testing but relies on the markings on the material as well as documentation;¹⁶ that paragraph 4.15 in the Quality Assurance Manual, material not in compliance, (quoted above) deals with materials which are not in compliance with ASME standards but "that deals with material more so that was ordered for a job specific than it does for stock" (Tr. 262); that the manual deals with the treatment of material that comes in that is not ASME only if it came in for an ASME tank and Walker had to reject it; that if Walker fills out a purchase order for ASME material, and the material that came in is non-ASME rated, the receiving inspector has to notify the purchasing department because it is not in conformance with the pur-

¹⁶ Kuehl testified that Walker takes the material test report supplied to it by the mill with the incoming steel and compares it to the information on the ASME code and if it matches or exceeds, the material test report accepted.

chase order; that he did not know if Roloff contacted the purchasing department in connection with the material involved here; and that he did not speak to anyone in the purchasing department as part of his investigation of this matter and no one in the purchasing department contacted him about this shipment.¹⁷

Subsequently, Kuehl testified that he told Beck that there were four people involved as far as backtracking, namely himself, Day, and purchasing but he did not know if he told Beck 3 days; that if Brockman had spoken to quality control before releasing the involved material, and if Walker wanted to use the involved material (it was ordered as SA-36 which was ASME certified) for an ASME application, Walker would have gone through the same procedure it went through, namely going back to the mill to get the test report; that so as far as anyone's time is concerned, that time would have been lost one way or the other; that while he testified earlier that CD1018, which is how the involved material was described, is not ASME code material, in this instance the mill had done enough tests so that it could be certified as SA-36; that "he believed" that Roloff told him that the involved material was brought in for maintenance to use; and that he did not verify this, he did not speak to anyone in maintenance or purchasing to determine if maintenance had ordered it.

On further redirect, Kuehl testified if Brockman had called quality control regarding the involved material, the material would not have been released; that rather than pursue another test report quality control would have first asked if they had other material to use; that if they did not have other material to use then quality control would have went through purchasing just as it did; that he was not aware of whether they had other material that could be used; and that General Counsel's Exhibit 14 indicates that each of the two bars involved was 10-feet long and he was not sure what the designation "24 by 4 inches" on the delivery receipt meant.

Steven Day, who worked in quality control in New Lisbon in July and August 1999, testified that he was a quality control technician and he did not supervise anyone; that one of his jobs was to take material test reports that came in with materials and check them to make sure that proper chemicals or proper physicals are there and then he enters the information into the computer log, specifying heat number, a purchase order number, whatever size the material was, the type of material (i.e., 304, 316, or carbon steel), and then indicate "yes" or "no" as to whether it was good for ASME use; that a yellow tag certifies that material can be used for the job it is assigned to; that the person who signs the yellow tag is supposed to look at the heat log to determine if the material is suitable for the proposed use; that if the heat number is not in the heat log, the person is supposed to call him or Kuehl so that they can check the material test report on the involved material against the carbon steel

specifications; and that if after he checks the material test report it is determined that the material is not okay for ASME use,

[w]e'd say they could not use it. Very seldom would we—we have a red tag system that could be used, but we don't normally use that a lot for raw material because we use a lot of the material for other jobs that aren't ASME, and so when you put a red tag on something that normally ends up setting the material aside and nobody uses it for anything because it's got a red tag on it. [Tr. 283.]

Counsel for the Respondent then elicited the following testimony:

Q. Okay. The red tag would be affixed after somebody determined it was not code material?

A. Right. Right. [Tr. 283.]

Day further testified that Respondent's Exhibit 8(a) is an example of the Respondent's ASME certified material receiving log initialed by Brockman specifying the name of Marshall, who is in quality control, and the Respondent's Exhibit 8(b) is the page from the certified material receiving log which covers the involved material initialed by Brockman which does not also specify the name of someone in quality control; that Brockman did not call him to release the involved material; that after the job is completed, a material test report for each of the heat numbers in the traveler (or the quality control manufacturing check list) is checked to make sure that it is acceptable ASME material; that when he reviewed the heat numbers, he could not find a material test report to correspond to heat number H7387 which is the heat number for the involved material; that he found the documentation for material in a folder for material that he has not had a "chance to review the MTRs yet. . . . [and he] and he found this H7387 in that folder" (Tr. 293), and he determined that it was not acceptable SA-36 material; that he then told Kuehl that they had a problem and he spoke to Brockman to see if he had an additional material test report for the involved material; that when he told Brockman that they had a mistake and that the material was not proper material for the tank, he thought Brockman said that they needed the material, and it was ordered properly so when it came in, he released it; that he would have told Brockman that he did not have the authority to release material without the material test reports being okayed; that at the time only he and Kuehl had the authority to okay a material test report and certify that something was code; that Brockman's releasing the involved material without calling quality control was a violation of the quality control system and "[i]t could be a big mistake" (Tr. 296); and that he could not think of a prior situation where a yellow tag was written out without checking.

On cross-examination, Day testified that he believed that the material which Brockman released on July 15, had just come into the facility; that he suspected that the material was in response to a purchase order requesting material that was ASME certified because the majority of the material that Walker orders is ASME certified but he had "no way of really knowing for sure if that purchase order was for . . ." ASME certified material (Tr. 298); that in looking at the purchase order, attached to General Counsel's Exhibit 27 while he testified at the hearing

¹⁷ Kuehl testified as follows:

JUDGE WEST: I'm sorry. A question. Did you speak to people in purchasing as part of your investigation?

THE WITNESS: I didn't. I think—I'm not sure, I think Steve Day did, but I really didn't get involved as getting [sic] us a test report.

here he could tell that the purchase order was a request for ASME material because it specifies "SA-36"; and that if a shipment arrives in response to this purchase order and it is not ASME certified, the Receiving Inspector is responsible for notifying

[e]ither quality control—probably *first* he would maybe notify purchasing that material that was ordered isn't exactly what was—and normally as far as quality control being notified that it came in wrong, no, not really. We would find that out after he would turn in the material receiving record or something like that. [Emphasis added.]

Day further testified on cross-examination that the purchasing department would not contact quality control after Roloff contacted them; that Roloff then did something to indicate that the involved material was not ASME material in that he filled out a portion of the material receiving record, General Counsel's Exhibit 17; that as of July 15, Roloff knew that the material was not in conformance with the purchase order;¹⁸ that nonetheless Roloff did not have any obligation to do anything besides calling the purchasing department; that purchasing would only know what the purchasing order indicates and that is that it has to be SA-36;¹⁹ that while he spoke with Brockman about this matter, he did not speak with anyone in the purchasing department regarding the investigation of this matter and with respect to whether there was any additional documentation for the involved material after it had been used for the tank; that he did not speak to Roloff after the material was used to determine if there was additional documentation; that he probably (with a high degree of certainty) circled the "No" on the "MATERIAL OK PER SECTION II:" line of the involved material receiving record, General Counsel's Exhibit 17; that he could not positively testify that he circled this "No"; that Roloff could have circled this "No" but he doubted it; that he wrote "Meets requirements of Sec II Div-1" before the material receipt forms were copied and distributed to be filled out and he did not sign the involved material receipt form because the material did not meet anything so he just circled "No" that it was not good; and that he could not answer 100 percent that he circled "No."

Subsequently Day testified that the involved tank was hydro tested on July 23; that he believed that the tank was shipped out the day after it was tested, it had to go pretty quickly, and Brockman told him that they needed the involved bar to finish the tank because it was a rush; that he did not verify for himself that it was a rush; that more than likely the tank had been shipped out of the facility before he started reviewing the documents; that it is standard operating procedure for the paperwork to be forwarded to the vendee after the tank is shipped; and that Walker tries to review all the paperwork before the tank leaves so that if there is a problem, it can be corrected while the tank is still in the plant.

Roloff testified that he was the receiver in July and August 1999, at the involved New Lisbon plant; that he signed the

delivery receipt, General Counsel's Exhibit 14 and stamped it "RECEIVED JULY 14 1999"; that he was the one who received the involved shipment, which consisted of two pieces totaling in length about 24 feet; that he did not write "ordered SA36" on the "Material Certification" which came with the involved shipment; that he received General Counsel's Exhibit 16, a "CERTIFICATION" with the involved shipment; that he did not write "SA36" on the material receiving record on the line for "PO # INFORMATION: SPEC" and he does not know who did; that normally he does not get or see the purchase order form; that the involved purchase order does indicate "SA36"; that when the involved material was received he told one of the two purchasing people, he was not sure which one, that he felt that the material was for maintenance because maintenance had ordered that type of material to do maintenance work; that he "*thought*" that he had this conversation with purchasing; that when he received the involved material he "recognized that this type is not the normal type for stock . . . [b]ecause that—the only time we get that [CD 1018] in is for the maintenance department" (Tr. 323); that someone in purchasing told him "we might as well keep it because this probably is for use for maintenance department" (Tr. 324); that he does not look at Walker's purchase order when he unloads the truck to see if Walker is receiving what it ordered; that when he filled out the "MATERIAL RECEIVING RECORD" he placed the material on a "ASME hold cart" in the hold area; that it remains on the ASME hold cart in the hold area until the material receiving record is completed, "[i]t goes through Marshall Kuehl and Steve Day and they determine whether it is or is not good for ASME hold" (Tr. 326); that the "material cannot be removed from that cart until such time as it has been—material receive and record has went through Marshall Kuehl and Steve Day and they have checked it and when it comes back whether it is good for ASME or it's not good for ASME we then mark it" (Tr. 327); that whether bar complies with ASME certification or not, it is placed on the same kind of cart until it is checked in with the material receiving record and it is determined whether it is good for ASME, then it is marked and only then can it be put away into the inventory; that he did not circle the "NO" on the line of involved material receiving record indicating "MATERIAL OK PER SECTION II: YES NO"; that to his knowledge when he received the involved material it was not marked in any way "SA-36"; that he took the documents he received with the shipment to quality control; that after he put the material on the cart or after he spoke to someone in the purchasing department, he did not have some obligation to put a red tag on the material "because it is on a hold cart it doesn't need to have any sort of a red tag on it. A red tag means a hold that no one is to use that material because there is something wrong with it, some problems. *The hold cart is the same thing.*" (Tr. 330–331; ~~emphasis added~~)
On cross-examination Roloff testified that after the material is placed on a hold cart

¹⁸ Counsel for the Respondent stipulated that (a) "the purchase order identified the material that Brockman released," (b) the involved yellow tag references that purchase order, and (c) the material Brockman released came in on that purchase order.

¹⁹ As indicated above, SA-36 is ASME certified.

[t]he paperwork is processed and once the material receiving record is given to the two gentlemen to check, they check this material and they will stipulate either it is ASME certified or it's not and at that time I take the record with me and mark the

material with the heat and the case of bar stock, the heat, the PO and the type, minimum markings. (Tr. 331–332.)

Roloff further testified that after the documentation went through Kuehl and Day, he marked the involved material with the heat number, the PO, and the type; that he did not have direct knowledge whether the involved material was passed on to Brockman; that he can type the purchase order number into his computer and it shows him what the amount is and what the material is and he inputs the actual amount received; that with respect to whether “SA36” would be indicated in his computer, he would have to move the description field further open to see any more description other than the part number; that the “SA36” would be there but normally he does not see it unless he opens the computer screen up further; that Kuehl contacted him about a problem with the involved material, asking him to see a copy of the delivery receipt and they looked at the material receiving record; that Kuehl asked him if it had been marked and he told Kuehl that it had; that the hold cart with the involved material on it would have been right near the area where Brockman works; and that the area where Brockman works is not designated solely for ASME material.

On redirect, Roloff testified that the involved material had the purchase order number on a tag when it arrived at Walker’s facility; that he wrote “CD 1018” on the material; that he took the involved documents to Quality control on July 15; that “[o]n the 15th [of July he spoke with] . . . Steve Day [in Quality control] [and] . . . [h]e wrote this . . . this material receiving record and he checked it and he said that it did not meet ASME Day when he gets this, he has all the specifications for ASME, and he reviewed that material receiving record and he said that it did not meet what we need to have for ASME” (Tr. 344); that Day, “I believe,” circled the “NO” on the involved material receiving record; that General Counsel’s Exhibit 16 is called a certification; that quality control does not do a comparison of the actual numbers on a certification to the carbon steel specifications; that Day takes the material test report and determines whether or not it meets the carbon steel specification set by ASME; and that Kuehl and Day take the material test report and determine whether or not it meets the carbon steel specifications set by ASME.

Subsequently Roloff testified that most of the CD 1018 that comes in for maintenance comes in with a job number; that the involved shipment came in with only a part number which caused him to question to make sure that it was for maintenance; that when the involved shipment raised a question in his mind, the first thing he did was to go to the purchasing department; that when he went to the purchasing department they told him that it was probably for use by the maintenance department; that he could not remember which of the two in purchasing he “got a hold of”; that he received the shipment late in the day on July 14, and the following morning he went to Purchasing; that since he spoke with the person in purchasing over the telephone he could not say that the person either physically pulled out the involved purchase order or retrieved the information that was in the computer with respect to the purchase order; that he did not go to purchasing regarding the involved

material but rather he called them on the telephone²⁰; that he did not go to maintenance and ask them if they ordered this item; and that he has no personal knowledge whether anyone in the purchasing department went to maintenance and asked them if they had ordered this item.

Sletten testified that early in the first week of August 1999, she had discussions with Beck and Seufzer about the termination of Brockman; that Brockman’s discipline record was reviewed and it was noted that he had 3 suspensions and 13 written warnings; that Walker follows progressive discipline in some cases but before Brockman’s discharge there had been termination(s) without a prior suspension but she could not remember how many; that Walker does not have any kind of an automatic rule about suspension in connection with discharge; that it was her understanding that Brockman created a serious problem because he was the final checkpoint in the process; that the election observer for the Union at Walker’s Elroy facility is still employed by Walker; that named employees other than Brockman wore union T-shirts in 1998 and 1999; and that she did not have any knowledge in 1999 of anyone passing out union authorization cards or anything on behalf of the Union before Brockman’s discharge.

²⁰ As here pertinent, Roloff testified as follows:

JUDGE WEST: Okay. So when it raised a question in your mind as to whether it was for maintenance the first thing you did was you went to the purchasing department?

THE WITNESS: Yes.

JUDGE WEST: This is the same purchasing department which issued a purchasing order for CS flat bar one by five SA-36, is that correct?

THE WITNESS: Yes.

JUDGE WEST: And notwithstanding that, when you went to this purchasing department and said I have a question about this shipment they said to you we agree with you, that is for maintenance?

THE WITNESS: They felt that it was probably for use for the maintenance department.

JUDGE WEST: Who in purchasing told you this?

THE WITNESS: I—there’s two people there and I’m sorry I can’t remember which one I got a hold of.

JUDGE WEST: Did the person that you were speaking with on the 14th, you went that same day on the 14th?

THE WITNESS: No, on the 15th, when I wrote this.

JUDGE WEST: You went the 15?

THE WITNESS: Yes.

....

JUDGE WEST: The following morning as opposed to the afternoon you went to purchasing?

THE WITNESS: Yes.

JUDGE WEST: You spoke with someone in purchasing, you raised your concern?

THE WITNESS: Okay. The person you were speaking with, did they pull up either the physical document or did they go to the computer and pull up—retrieve the information that was in the computer with respect to the purchase order?

THE WITNESS: I can’t tell you that. That was over the phone.

JUDGE WEST: It was over the phone do you didn’t go to purchasing, you called them on the telephone?

THE WITNESS: I called them on the telephone, yes.

[Tr. 347–348.]

On cross-examination Sletten testified that the 13 written warnings go back as far as February 19, 1987; that she believed that Beck reviewed Brockman's file; that the problem with the involved material was serious because Beck thought that it was going to take a lot of time and money to rework the tank; that it was her understanding that Walker was going to have to send a team out to where the tank was located or have the tank shipped back to be rebuilt; that as of August 4, she did not know if the tank had to be reworked; that she could not recall if the three suspensions during Brockman's employment history were all for absenteeism²¹; and that as indicated in General Counsel's Exhibit 25, the three suspensions were for absenteeism and Brockman never had a suspension for performance.

Brockman testified that Beck told him that he wanted to meet with him and when he went to Beck's office, Beck told him, in the presence of Dawn Seufzer, that he was going to have to let him go because of his job performance in that the flat bar used on the ASME tank that went out was not ASME material; and that he asked Beck if this was about the union activity, about the Union, about FMLA; and that Beck said "No."

On cross-examination Brockman testified that the only people who can sign a yellow tag in the involved plant are those who have been trained by quality control; that the purpose of signing a yellow tag is for the person releasing the material to certify that the material being sent to the floor meets code; that the yellow tag indicates that someone has in fact checked; that the heat log indicates whether a particular piece of material is ASME certified; that he did not see the purchase order or the material receiving record before filling out the yellow tag; that the only way that it is established that the material is ASME certified is if it is on the heat log; that there is one other way to establish that the material is ASME certified and that is to telephone Kuehl or Day in quality control and ask them to check and give their approval if it is ASME material; that the material is not supposed to be released to the floor if the information is not on the heat log; and that he released the involved material without checking the heat log or telephoning Kuehl or Day.

On redirect, Brockman testified that when the involved material was delivered "[i]t came in immediately and they knew I needed it so they rolled it down to me. He [Roloff] must have filled this [the material receiving record] out and rolled it [the flat bars] down to me and I cut it. They were waiting for it." (Tr. 170-171.)

Subsequently Brockman testified that he assumed that the involved material was ASME certified because (1) there was no red tag on it or anything else on it to indicate to him that it was not ASME material, (2) non-ASME material is not usually kept in his area (3) the involved material was brought directly to him, (4) the involved material was not placed in stock and he did not pull it out of stock, and (5) he personally had telephoned purchasing agent Ritch Rosbaum and told him that he needed the ASME certified 1-by-5-inch flat bar.

²¹ As noted above, Sletten originally testified that Brockman had been suspended for performance.

On August 19, the Respondent held a job fair at its New Lisbon location.²² Sletten testified that she happened to be at the front door of the facility when two union organizers appeared at the door; that she recognized the two organizers, Bechard and Blair; and that they had union T-shirts on. Both of the organizers filled out applications. General Counsel's Exhibit 9 Kathy Sletten also testified that she recognized her voice on a tape recording, General Counsel's Exhibit 10, the words on the tape recording are the words she said, and she was speaking with Jeff Bechard at the time of the tape recording on August 19. A transcript of the tape recording was received in evidence as General Counsel's Exhibit 11. As here pertinent it reads as follows:

KATHY: All set?
JEFF: Yep.
KATHY: Okay.
JEFF: Do we get to, uh, take a tour of the facility?
KATHY: No, we're not giving tours.
JEFF: Oh, some of the guys got took out.
KATHY: One guy took a weld test (couple of words unclear)
JEFF: Oh, could I take a weld test?
KATHY: No.
JEFF: How come?
KATHY: Because, you guys know why you're here. You're not here to apply for jobs.
JEFF: I'd like to work here.
Kathy: Well, we'll check this over and maybe give you a call.
JEFF: Can—do you have to do something special to take a weld test? Is there some written—
KATHY: Are you already a welder?
JEFF: Yeah.
KATHY: Well I'm not going to give you a weld test. I'm not going to take you down on the floor.
JEFF: Why not?
KATHY: Because you are here from the Union and I'm just not going to do that. You're not here for—
JEFF: I'd like—
KATHY:—job.
TODD: Did, uh, these other guys get interviews?

²² the announcement of the job fair was received as GC Exh. 8. As here pertinent, it reads as follows:

JOB FAIR
Thursday, August 19
Walker
Stainless Equipment Company
625 State Street, New Lisbon, WI

Stop by and see us on Thursday, August 19. you can fill out an application, speak with a Walker Representative, and find out why Walker is one of South Central Wisconsin's leading employers.

We will be accepting applications and doing interviews during the following times:

9:00 to 11:00 a.m.
and 5:00 to 7:00 p.m.

...

KATHY: I'd wish you'd leave now. I think you came up here you—

JEFF: I'd like to—

KATHY: —filled out an application

JEFF: —I'd like to—

KATHY: I'm not going to do it.

JEFF: So you're you're—preferential treatment then.

KATHY: Yeah.

JEFF: Thank you.

KATHY: If you want to call it that.

JEFF: Okay, thanks.

KATHY: Okay.

JEFF: And your name's, your name's Kathy, right?

KATHY: Yes.

JEFF: Okay. Thank you.

Bechard testified on cross-examination that when he testified at the trial here he was working at Walker's; that in August 1999, after Brockman was terminated, he filled out an application at a job fair at Walker; that he was not given a welding test or an interview on the day he filled out the application; that subsequently Sletten telephoned him and asked him to complete the selection process; that he filed a charge against Walker with the National Labor Relations Board (Board) and then stopped in and asked if his application was still good; that he was hired by Walker and he had been working for 2 weeks when he testified at the trial here; that the job fair was held on August 19, and Sletten telephoned him during the week of August 22, and left a message on his answer machine, inviting him to come in for an interview and welding test; that he canceled the appointment to take a welding test on September 3, indicating that he did not live in the area and he did not want to make a special trip down to Walker; and that he was interviewed and took a welding test after he stopped at Walker and asked if his application was still active.

Sletten testified that two people took welding tests on the day of the job fair; that one, Rutkowski, had already interviewed and was scheduled to come in that day for a welding test, and he was not there as part of the job fair; that another man, Phil Hawley, had a welding test but she was not involved in him getting a welding test and she did not know at the time that he had gotten the test; that welding tests were not part of the plan for that day; that no one was interviewed on the day of the job fair; that some of the people who came to the job fair were called back later and invited for interviews and a couple were called back for welding tests; that the job fair was on Thursday August 19 and she telephoned Bechard and Blair the following Monday; that she believed that she left messages inviting them to come back for an interview and weld test; that while Blair left a message that he would call and set up a time, he never came in for an interview and welding test; that Bechard asked her what type of job was available, agreed to come in for an interview, and then canceled the interview because it was too far out of his area; that she had subsequent voice mail exchanges with Bechard and eventually he came in for an interview and welding test; and that Bechard pushed back his start date with Walker and he started on February 14, 2000.

Analysis

As set forth by the Board in *Fluor Daniel, Inc.*, 304 NLRB 970 (1991):

In *Wright Line*, 251 NLRB 1083, enf'd. 662 F.2d 899 (1st Cir. 1981), cert denied 455 U.S. 989 (1982), [approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983)] the Board set forth its causation test for cases alleging violations of the Act turning on employer motivation. First, the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a "motivation factor" in the employer's decision. Once accomplished, the burden then shifts to the employer to demonstrate that the same action would have taken place notwithstanding the protected conduct. It is also well settled, however, that when a Respondent's stated motives for its actions are found to be false, the circumstances may warrant an inference that the true motive is an unlawful one that the respondent desires to conceal. The motive may be inferred from the total circumstances proved. Under certain circumstances the Board will infer animus in the absence of direct evidence. That finding may be inferred from the record as a whole. [Footnotes omitted.]

In order to establish a prima facie violation of Section 8(a)(1) and (3) of the Act, the General Counsel must establish union activity, employer knowledge, antiunion animus, and adverse action taken against someone involved or suspected of involvement which has the effect of encouraging or discouraging union activity. Inferences of animus and discriminatory motivation may be warranted under all the circumstances of a case, even without direct evidence. Evidence of false reasons given in defense may support such inferences.

The General Counsel has established that Brockman engaged in union activity and the Respondent knew about it before he was discharged. Brockman was the employee who originally contacted the Union. While it was not demonstrated that the Respondent was aware of this fact, Brockman was an observer for the Union at the Board election, he solicited signatures on union authorization cards, and he distributed handbills. Brockman also was the one who brought the antiunion postings to the attention of management. Brockman headed the employees listed on one of the postings. Brockman wore union T-shirts before and after the October 1998 Board election. Indeed after the union organizer wrote employees twice about a meeting to discuss renewed interest in bringing a Union into the Respondent's facilities and held a meeting with the employees on July 21, Beck approached Brockman in late July 1999, and asked him if he wanted to trade the union T-shirt in for two of the "On our own" T-shirts. While this was done in "kind of a joking manner," Beck was asking Brockman if he was willing to give up a symbol of support for the Union and wear a symbol of support against the Union.²³ In effect Beck was asking

²³ On brief counsel for the Respondent argues as follows:

Brockman testified after Brad Beck. Beck was not recalled to respond to his testimony because the General Counsel introduced General . . . [Counsel's Exhibit 25], one of the Respondent's position letter. Those

Brockman, at about the same time that the Respondent was taking the position that there was a problem with the involved tank and deciding what to do, if he was willing to abandon his support for the Union. He was not.

Beck did not deny Brockman's testimony that sometime after the July 21 union meeting Beck was in the area when Brockman was handing out union authorization cards.²⁴ Brockman was active again and the Respondent's management through Beck knew it.

With respect to antiunion animus, the General Counsel, on brief, contends that Sletten expressed animus August 19, when she told Bechard and Blair that she was not going to give them a weld test because they were from the Union. The Respondent on brief argues, as here pertinent, that the handbook statement is not enough to prove animus; that nothing in the conversation Beck had with Brockman about trading his union T-shirt for two company "On our own" T-shirts is remotely connected to

position statements were admitted without restrictions. (R. 45-46) Beck's denial of this conversation is at . . . [GC Exh. 25, p. 4].

First, Beck was called by the General Counsel as an adverse witness. The Respondent never called Beck as a witness to deny this conversation. Nothing precluded the Respondent from calling Beck as a witness. Second, the assertion that "Beck's denial of this conversation is at GC Ex. 25, p. 4" is false. Beck did not sign the position statement. What is on p. 4 of the GC Exh. 25 is an assertion of the Respondent's attorney. This is the same attorney who now claims that he was mistaken in asserting in a position statement that Roloff circled the "NO" on the GC Exh. 17, the material receiving record. Roloff testified that he first spoke with the attorney some time after the position statement was forwarded to the Board. So, this same attorney was apparently willing to make the assertion about Roloff without even speaking to him. And third, it is well established Board law that a lawyer's position letter can be received as an admission if it contains a statement or statements conflicting with the party's position. *McKenzie Engineering, Co.*, 326 NLRB 473, 485 fn. 6 (1998). While admissions in a position statement can be received and weighed against the client, a party may not affirmatively rely on its own assertions in position statements. Position statements are hearsay, except to the extent they contain admissions which are by definition not hearsay, Rule 801(d)(2) of the Fed.R.Evid. Brockman's uncontroverted testimony about this conversation is credited.

²⁴ The Respondent's attorney on brief argues that the evidence is that neither Beck nor Sletten "saw him [Brockman] passing out union literature. [GC Exh. 27, p. 4]." (R. Br. 5.) First, Brockman did not alleged that Sletten "saw him." Second, the attorney's position statement reads as follows:

I did not make an effort to determine if, in fact, the two named individuals actually saw Brockman do anything. I stopped asking questions when Kathy Sletten and Brad Beck both told me they were *not told* of any such activity. Mr. Beck made the decision to terminate Brockman. Ms. Sletten reviewed the decision. [Emphasis added.]

Consequently the attorney's position statement does not even support his assertion on brief. The position statement refers to what Beck was told, not what he saw. Third, as noted above, position statements are hearsay, except to the extent they contain admissions. If the Respondent wanted Beck to deny Brockman's testimony, Beck should have been called as a witness by the Respondent. Hew as not. Brockman's testimony about Beck being in the area is uncontroverted. Undoubtedly Beck was not called as a witness by the Respondent and asked a direct question regarding this matter because he could not deny Brockman's testimony. Brockman's testimony is credited.

antiunion animus; that the August 19 incident with Sletten and the two organizers is inconsequential and de minimis, and, as to animus, there is no indication of animus toward employees who are interested in a union or evidence of animus towards the union itself but rather is a statement that the two union organizers are likely there to be disruptive;²⁵ and that there is insufficient evidence of animus in the record. Although the pertinent portion of the Respondent's employee handbook does not rise to the level of an unfair labor practice, this, in conjunction with (a) the practice initiated in July 1999, of giving new employees "On our own" T-shirts,²⁶ (b) the Respondent telling two union organizers on August 19, that they could not take weld tests because they were from the Union and not bona fide applicant's, and (c) failing to consider the two union organizers for hire on August 19, rises to the level, in my opinion, of substantial evidence of antiunion animus sufficient to warrant the inference that the Respondent would unlawfully terminate an employee because of his union support, activities, and his continuing attempt to organize the Respondent's employees. The General Counsel has established that the protected conduct was a motivating factor in the Respondent's decision to terminate Brockman.

In my opinion the Respondent has not shown that it would have terminated Brockman even if he did not engage in a continuing attempt to organize the Respondent's employees. General Counsel on brief contends that Brockman was treated disparately in that while Day knew that the material was not ASME certified he did not notify Brockman of that fact; that either Roloff was at fault for failing to call the nonconforming steel to Brockman's attention, or Day was at fault for noting on the material receiving record that the steel was not ASME certified, but then letting Roloff hand it off to Brockman; that Beck testified that Roloff could have been subject to discipline; that Brockman's error turned out to be a "paper work" error; and that the Respondent would have gone through the same process of verification if Brockman had contacted quality control on July 15, so there was no extra cost to the Respondent. The Respondent on brief argues that there is no evidence of disparate treatment in that Roloff did not do anything wrong since he checked with the purchasing department about the material not being what was ordered and was not told to send it back; that

²⁵ There was nothing to justify such a conclusion. The obvious concern was that if they were hired they would engage in an attempt to organize the Respondent's employees. That is what "salting" is all about.

²⁶ It is one thing to have an antiunion statement in an employee handbook. It is quite something else to give each new employee an antiunion T-Shirt. This is something different than an employer making available antiunion T-shirts to its employees during a union organizing drive (as opposed to giving the employees the antiunion T-shirts and noting who takes them). Here the Respondent is giving each individual new employee an antiunion T-shirt whether or not he or she wants it. This is an indication that the Company excepts new hires to be antiunion. This conduct infringes on the right of new hires to decide whether or not they will support union representation. New hires can remain silent and accept the antiunion T-shirt whether or not they believe in union representation. Or new hires can reject the antiunion T-shirt and this rejection would indicate to the Respondent that the new hire more than likely would be for union representation.

Roloff was not involved in ordering this material, there is nothing to suggest he knew how, when or where it was to be used, or that Brockman was in a hurry for this material; and that the General Counsel cannot use Roloff as an example of disparate treatment.

The involved material was not ordered for stock. Although there was no job number on the purchase order, the purchasing department knew who requested that the material be ordered. Brockman testified that he dealt with purchasing agent Ritch Rosbaum with respect to ordering the involved material, and he told Rosbaum that he needed ASME certified 1-by-5-inch flat bar. Brockman needed a limited quantity. The shipment only involved two pieces totaling less than 25 linear feet. Brockman's uncontroverted testimony that Walker did not have any of the required 1" x 5" flat bar in stock and they were waiting for this material, it was a rush, is credited.²⁷ As Beck testified, the involved material should have been ordered for a specific job and not for stock.²⁸ Was this a mistake on the part of the purchasing department? Rosbaum did not testify to explain why the purchasing order did not specify a job number. Indeed no one from purchasing testified about this or a number of other questions which were left open on the record.²⁹

Beck, Kuehl, and Day all agree that Roloff as receiving inspector was responsible for checking the shipment against the purchase order. As noted above, Beck testified that the receiving inspector, Roloff, has the responsibility to accept or reject materials which are not in conformance with the purchase order, placing a red tag on material that is not ASME certified; that ASME certified material had been requested for the involved job and if the material coming in was not ASME certified, the individual who received that material should have placed a red tag notice on the material; that this should have been done before the material went to Brockman; that he did not check and he did not know whether the individual who received the steel and passed it on to Brockman put a red tag on it before passing it on to Brockman; and that the individual who received the steel which was supposed to be ASME certified but was not, and just passed it on was not doing his job and

could have been subject to discipline. Roloff was not disciplined over this matter. Roloff attempted to get around this by explaining that he does not look at the full purchase order since this would require him to make an adjustment on his computer to get the full screen. Rather he was satisfied to only look at the part number and speculate, without checking with maintenance, that it was ordered as non-ASME material for a maintenance job. In response to a number of questions, Roloff was initially willing to testify that he went to the purchasing department on July 15, about the involved shipment. Only when the obvious question was asked, namely didn't the purchasing department look at the full purchase order when you brought this to their attention, did Roloff change his testimony and assert that he did not go to the purchasing department but rather he called them. Roloff maintained that he did not write "SA36" on the material receiving record. Roloff realized that there was a problem with the shipment. He also did not fully deny that the material should have been red tagged.

Rather, as noted above, he took the position that he did not have some obligation to put a red tag on the material "because it is on a hold cart it doesn't need to have any sort of a red tag on it. A red tag means a hold that no one is to use that material because there is something wrong with it, some problems. *The hold cart is the same thing.*" (Tr. 330-331; emphasis added.) Walker's own rules (4.15) require that material not in compliance . . . will be rejected and tagged with the 'red' hold tag" Beck appreciated this. Kuehl tried to get around the rule by asserting that the material was ordered for non-ASME use. And his assertion that the receiving inspector is not supposed to do anything with a red tag if the material is ordered SA36 but does not come in with an indication that it is SA36 not only flies in the face of the rule but is contrary to Roloff's testimony. Roloff appreciated that something had to be done. Roloff took the position that placing the material on a hold cart in a hold area was the equivalent of a red tag. Day appreciated the fact that a red tag should be affixed after somebody determines that the shipment is not code material but he unconvincingly testified that while there is a red tag system that could be used, it is not normally used a lot for raw materials. In other words, Day apparently takes the position that the rule is not normally followed. That is a strange approach in a situation where Walker is trying to justify terminating Brockman for not following a rule.

Also strange is the fact that, on the one hand, Roloff testified that on July 15 he spoke with Day in quality control about the involved material and Day checked it and said that it did not meet ASME. On the other hand, Day testifies that, after the tank has been shipped, he found the involved Heat #H7387 document in a folder for material that he had not had a "chance to review the MTRs yet." Would not Day have reviewed the Heat # H7387 document on July 15, when according to Roloff, Day decided that the material did not meet ASME?³⁰

While Roloff testified that he believed that Day circled the "NO" on the material receiving record, Day testified, as noted

²⁷ As Kuehl testified, while he was not aware whether or not Walker had other material that could be used for the involved job, since there were two different heat numbers for the involved item on the inspection sheet (traveler), that would suggest that there was not enough material on hand and as a consequence more material had to be ordered for that particular job to be completed.

²⁸ Also Roloff testified that he believed that the material was for work that maintenance was doing.

²⁹ Such questions include, but are not limited to, why was no job number placed on the purchase order, did Roloff come to or did he telephone the purchasing department when the involved material was received, when Roloff spoke to someone in the purchasing department did they look at the purchase order to determine that ASME was specifically requested, was there any other documentation in the purchasing department which would indicate that Brockman had them order the involved material, did someone in the purchasing department tell Roloff that the material was for maintenance, on what basis did they determine that the involved material was for maintenance, did anyone in purchasing spend any time in locating an acceptable metallurgical test report for the involved material, and, if they did, how was this communicated to Kuehl or Day.

³⁰ If the Heat #H&387 document in the folder for material that he had not had a "chance to review the MTRs yet" was not a copy of GC Exh. 16, then what material did the document cover?

above, that he probably (with a high degree of certainty) circled the "NO" on the "MATERIAL OK PER SECTION II:" line of the involved material receiving record, General Counsel's Exhibit 17; that he could not positively testify that he circled this "NO"; that Roloff could have circled this "NO" but he doubted it; that he did not sign the involved material receipt form because the material did not meet anything so he just circled "NO" that it was not good; and that he was not 100-percent sure he circled the "NO." Day neither specifically corroborated Roloff regarding meeting with him on July 15, about the involved material nor did he deny this meeting.

As noted above, one of the Respondent's position statements indicates that Roloff circled the "NO." Also, as noted above, Roloff denies circling the "NO."

Strangely Beck eventually testifies that he knew that the involved material was ASME at the time he told Brockman that he was terminated on August 4. Yet the handwritten date by Kuehl on the involved "CERTIFIED MILL TEST REPORT" is August 6. Kuehl testified that the test report might have been faxed or mailed, and it might have been received the day before he signed it on August 6. There is no fax number on the copy introduced into evidence. If Beck was relying on a verbal assurance given before Walker allegedly received the acceptable mill test report, he did not indicate this to be the case. Kuehl testified that he and Day compared the data on the mill test report to the carbon steel specifications and he signed it. Again, his signature is dated August 6. Day did not specifically corroborate Kuehl about the August 6 comparison and he did not sign the mill test report.

While Beck and Kuehl testified about four people spending time trying to locate an acceptable mill test report, and Beck testified that he was relying on the statement of Kuehl, Kuehl and Day testified that they did not speak with anyone in the purchasing department regarding the investigation of this matter. If that was the case, on what basis did Kuehl testify that he, Day, and two people in purchasing were the four involved in this endeavor? When Day twice testified that he did not speak to anyone in purchasing with respect to the investigation of this matter and with respect to whether there was any additional documentation for the shipment, he did not corroborate Kuehl who testified that Day went through purchasing to get an acceptable mill test report. At one point Kuehl testified that "Steve Day went through purchasing [contacting the manufacturer of the steel bar]. They worked to get acceptable test reports." (Tr. 219.) As noted above, at another point when Kuehl was asked if he contacted anyone in the purchasing department as part of his investigation, he answered, "I didn't. I think—I'm not sure. I think Steve Day did, but I didn't really get involved as getting [sic] us a test report." No one from purchasing testified about what role, if any, they may have played in getting an acceptable test report.

The involved purchase order specified SA36 which is ASME certified material. The delivery receipt from Ryerson, General Counsel's Exhibit 14, indicates as here pertinent "T/R WITH SHIPMENT." The involved "JOSEPH T. RYERSON & SON, INC." Material Certification, General Counsel's Exhibit 15, as here pertinent, indicates as follows:

....

Item Instructions

SEND CERTS WITH SHIPMENT
TEST REPORTS W MATL ON ALL ITE
MS
CERTIFIED

Part Number
FBRCS10000500

....

This document certifies that the material described above was shipped on your order and that the attached data is a true copy of the test report furnished by the producer with said material.

The only other document which the Respondent's witnesses refer to, and which was introduced into evidence regarding the shipping documents received with the shipment, is a one page document titled "CERTIFICATION," General Counsel's Exhibit 16.³¹ As designated by the SA36 on the purchase order, ASME material was ordered. The material certification sent with the shipment, General Counsel's Exhibit 15, refers to the purchase order and then refers to "CERTS" and a test report. Since only two certs were referred to by the Respondent, apparently the Respondent is taking the position that one of the "CERTS" is the test report referred to in the material decertification, General Counsel's Exhibit 15. If that is the case, why wasn't this indicated on the material receiving record, General Counsel's Exhibit 17, on the line designated "MTRS RECEIVED:"?

The Respondent's witnesses tried to leave the impression that the involved shipment was not the material required to reinforce the bottom head on the involved tank. For the reasons specified above, it has been found that Walker did not have the material in stock and it had to be ordered. If the involved shipment was not the material for the tank, Walker did not produce another purchase order covering the involved 1" x 5" flat bar. And if the other order was canceled because it was no longer necessary, Walker did not produce the documentation showing the cancellation. Again no one from the purchasing department testified so these questions remain unanswered.

The involved shipment was the material that was meant to be used for the involved tank. Assuming arguendo that an acceptable test report did not accompany the shipment on July 14, Walker would still have had to spend whatever time it alleges it did locating an acceptable MTR.

If the Respondent's witnesses are to be believed, Roloff, although it is his job, does not check the full purchase order so that he can claim that he did not determine that while the purchase order specified ASME, that is not what he received. Since Roloff changed his testimony to make sure he was not present when someone in purchasing had to resolve the prob-

³¹ This document does refer to Heat H&387 and it specifies numbers under what appears to be symbols, as here pertinent, for the elements carbon, manganese, phosphorus, sulphur, and silicon. Just before the signature line on the document the following is indicated: "WE CERTIFY THE CHEMICAL RESULTS AND/OR ATTACHED PHYSICAL TESTS WERE DETERMINED BY STANDARD METHODS AND ARE CORRECT AS CONTAINED IN THE RECORDS OF THE CORPORATION." But the "CERTIFICAION" does not appear to give the tensile strength or yield point which are required for ASME material.

lem by looking at the purchase order and any other notations indicating who asked for the material and why, and no one in purchasing testified, we do not know why they were satisfied to speculate, as alleged, that the shipment was meant for maintenance. And since Day had to be shown the purchase order by the General Counsel on the witness stand before he changed his testimony that he had no way of really knowing for sure if the involved purchase order was for ASME material, it would appear the he never saw the purchase order before. As he eventually conceded, the purchase order did request ASME material because it specifies SA36.

With the evidence at hand and with the lack of evidence one would expect, one must wonder whether an acceptable MTR did originally accompany the involved shipment.³² But for the sake of argument let's assume that an acceptable MTR did not accompany the shipment on July 14.

The material is ordered for a specific job but the purchasing agent does not place the job number on the purchase order. Why not? The shipment comes in and Roloff apparently does not check the full purchase order as he is supposed to. Why not? If he had checked the full purchase order, he would have seen that the shipment was not in compliance. At that point he should have placed a red tag on the shipment. The rule, 4.15, speaks to a red tag and not a hold cart which could be used for any flat bar whether ASME or not. Allegedly the purchasing department is satisfied to speculate instead of checking the purchase order and finding out why the material was ordered. Brockman testified that he personally spoke with purchasing agent Ritch Rosbaum and told him that he needed that ASME certified 1" x 5" flat bar. The purchase order specifies "RITCH" under "Buyer" so how difficult could it have been to determine what the material was ordered for? Neither Rosbaum nor anyone else from purchasing testified at the trial here. Day never specifically corroborates Roloff that he met with him on July 15, about the involved shipment. And Day never unequivocally testified that he, and not Roloff, circled the "No" on the involved material receiving record. Roloff unequivocally testified that, contrary to the Respondent's attorney's position statement, he did not circle the "No." If Roloff did not and if Day did not, then who did? Day does not unequivocally concede that he determined on July 15 that the material did not meet ASME requirements. And Day did not testify that he was aware on July 15 that the purchase order called for material which met ASME requirements. But he did testify that the material for the involved part number has to be SA36 (or ASME certified).

As noted above, Brockman testified that he assumed that the involved material was ASME certified because (1) there was no red tag on it or anything else on it to indicate to him that it was not ASME material, (2) non-ASME material is not usually kept in his area (3) the involved material was brought directly to him, (4) the involved material was not placed in stock and he

did not pull it out of stock, and (5) he personally had telephoned purchasing agent Ritch Rosbaum and told him that he needed the ASME certified 1-by-5-inch flat bar. Brockman's testimony is credited. I found Brockman to be a credible witness. While what Brockman did is understandable under the circumstances extant at the time, it is not acceptable because he did not follow Walker's rule regarding checking with quality control when the heat number is not in the log. But Brockman is not alone. If one accepts the Respondent's scenario, Roloff's, purchasing's, and perhaps Day's approach leave something to be desired as far as Walker's rules and common sense are concerned. As Beck testified, the receiving inspector should have placed a red tag on the involved material since it was not in conformance with the purchase order, that this should have been done before the material went to Brockman and if the receiving inspector did not place a red tag on the material and just passed it on to Brockman, the Receiving Inspector could have been subject to discipline. Roloff was not disciplined regarding this matter. No one in the purchasing department is disciplined. Day is not disciplined. So accepting the Company's scenario for the sake of argument, the only one involved in this matter who is disciplined is Brockman. Once the General Counsel makes a prima facie showing, the burden of going forward is on the Respondent. The Respondent must show that it had a business justification for the discharge, that it would have discharged the involved employee even if he was not engaged in union activity. The Respondent has not made this showing. The Respondent chose for whatever reason not to call Rosbaum or someone else from the purchasing department to answer a number of obvious questions. The Respondent chose to treat Brockman disparately. In my opinion, Brockman was discharged because there was a renewed attempt to organize Walker's employees, Beck saw Brockman passing out union authorization cards, and Beck ascertained that Brockman was not willing to switch his allegiance and wear antiunion T-shirts. The Respondent violated the Act in discharging Brockman.

In my opinion, Walker also violated the Act in telling Bechard and Blair on August 19 that they could not take weld tests because they were from the Union and not bona fide applicants, and in failing to consider Bechard and Blair for hire on August 19. As indicated above, in its answer to the complaint the Respondent admitted that Bechard and Blair were not allowed to take a welding test on August 19, and Sletten questioned whether they were bona fide applicants; and that only on August 19 Sletten did not consider Bechard and Blair to be serious applicants.

Since *NLRB v. Town & Country Electric*, 516 U.S.85 (1995), no lawful purpose is served by an employer telling a union organizer that he can not be a bona fide applicant for employment with the employer because he works for a union. Sletten was not a credible witness. She was not truthful with respect to what was said between herself and Bechard on August 19. Sletten did not tell Bechard on August 19, that he would not be given a weld test because weld tests were not being given that day. Rather, Sletten told Bechard he would not be given a weld test because he was there from the Union and he was not there for a job. I do not credit Sletten's testimony that no one was

³² Kuehl testified that Day gave him the involved acceptable mill test report. Day did not testify as to how or when he got the acceptable mill test report. And, as noted above, Day testified that he did not speak with anyone in the purchasing department regarding the investigation of this matter and whether there was any additional documentation for the shipment.

interviewed on the day of the fair. Sletten's testimony is belied by Walker's own ad in that it indicates, in part, as follows:

Stop by and see us on Thursday, August 19. You can fill out an application, speak with a Walker Representative, and find out why Walker is one of South Central Wisconsin's leading employers.

We will be accepting applications and *doing interviews* during the following times:

9:00 to 11:00 a.m.
and 5:00 to 7:00 p.m.
[Emphasis added.]

As pointed out by the Board in *FES*, 331 NLRB 9, 15 (2000):

To establish a discriminatory refusal to consider, pursuant to *Wright Line*, supra, the General Counsel bears the burden of showing the following at the hearing on the merits: (1) that the respondent excluded applicants from a hiring process; and (2) that antiunion animus contributed to the decision not to consider the applicants for employment. Once this is established, the burden will shift to the respondent to show that it would not have considered the applicants even in the absence of their union activity or affiliation.

If the respondent fails to meet its burden, then a violation of Section 8(a)(3) is established.

Here, Sletten excluded Bechard and Blair from the hiring process on August 19. She let them fill out applications but she would not allow them to take a weld test and they were not interviewed. One need only read the transcript of the August 19 conversation set out above to see that antiunion animus contributed to the decision not to consider the applicants for employment. Contrary to the Respondent's argument on brief, what Sletten said was not "a statement that two otherwise full-time paid organizers are likely there to be disruptive." (R. Br. 29.) Rather Sletten said what she said because she realized that Bechard and Blair are union organizers and if given the opportunity, they will organize employees. On August 19 Walker, through Sletten did not intend to give them the opportunity. Undoubtedly, subsequently someone explained to Walker that it really had no choice. It had to treat them as bona fide applicants. But what we are focusing on is their treatment on August 19. On August 19, the Respondent violated the Act by telling Bechard and Blair that they could not take weld tests because they were from the Union and not bona fide job applicants, and by failing to consider them for hire on that date.

CONCLUSIONS OF LAW

1. Walker Stainless, Inc. is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(1) of the Act by telling applicants Jeff Bechard and Todd Blair that they could not take weld tests because they were from the Union and not bona fide applicants.

4. The Respondent violated Section 8(a)(3) and (1) of the Act by discharging its employee Dennis Brockman on August 4, 1999, and by failing to consider Jeff Bechard and Todd Blair for hire on August 19, 1999.

5. The Respondent's unfair labor practices described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent engaged in certain unfair labor practices within the meaning of Section 8(a)(1) of the Act, I shall recommend that the Respondent be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the purposes of the Act.

Having found that the Respondent unlawfully discharged Dennis Brockman, it will be recommended that the Respondent be ordered to reinstate him to his former position and make him whole for any loss of earnings and benefits he may have suffered as a result of the Respondent's unlawful conduct, in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

As indicated in *FES*, supra at 15:

The appropriate remedy for such a violation [refusal to consider] is a cease-and-desist order; an order to place the discriminatees in the position they would have been in, absent discrimination, for consideration for future openings and to consider them for the openings in accord with nondiscriminatory criteria; and an order to notify the discriminatees, the charging party, and the Regional Director of future openings in positions for which the discriminatees applied or substantially equivalent positions.¹⁵

[Recommended Order omitted from publication.]

¹⁵ Respondents will be required to provide such notification until the Regional Director concludes that the case should be closed on compliance.